APPEAL NO. 92011

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On December 10, 1991, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. (hearing officer) determined that the employee, (employee), the appellant herein, failed to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment as a "runner" with (employer) (hereinafter employer) on (date of injury), and, further that he did not sustain any injuries compensable under the 1989 Act.

DECISION

We find that the evidence supports the findings and conclusions of the hearing officer and affirm his decision.

The hearing officer is the sole judge of the weight, materiality, relevance, and credibility of the evidence. Art. 8308-6.34 (e). His decision should not be set aside because different inferences and conclusions may be drawn on review, even though the record contains evidence of inconsistent inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.- Amarillo 1974, no writ). The claimant has the burden of proving by competent evidence that an injury occurred within the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.- Beaumont 1976, writ ref'd n.r.e.). The finder of fact has the right to judge the credibility of the claimant and weight to be given to his testimony, in light of other testimony in the record. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.- Amarillo 1978, no writ). Only if the evidence supporting the hearing officer's determination is so weak, or if the decision is so against the overwhelming weight and preponderance of the evidence as to be clearly wrong and unjust, is it appropriate for the trier of fact to be reversed on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The contested case hearing was convened to consider two issues: whether the appellant was injured on (date of injury), within the course and scope of his employment; and whether hardship resulted from non-payment of benefits. (Although the hearing officer did not reach the second issue because he found against claimant under the first issue, we would note that the extent of hardship incurred by a claimant who is without income does not affect the amount and duration of benefits, or entitlement to benefits, due under the 1989 Act).

On (date of injury), the appellant worked for employer as a runner of food between the kitchen and cafeterias operated by employer on the premises of another company. He stated that he was pushing three carts of food onto the freight elevator to deliver them to Cafeteria F. Each cart was about six feet high, and 2-1/2 feet square; the carts were lined up one behind the other but were not hooked together. He stated that he was in the process of pushing the carts onto the service elevator when the elevator door closed on a cart; he

was unable to see where the door hit on the cart. He stated that the carts were forced back two to three feet, which caused him to step into a drain with his right foot and fall to the ground. There were no witnesses. Appellant testified that his feet were getting swollen during the day, that he limped for three days, and he first consulted a physician, (Dr. J), on (date of injury).

Appellant's wife, (Ms. G), an employee of USAA, the company for whom employer operated food services, testified that she was acquainted with (" Ms. B"), who handled insurance matters for the employer, as well as acquainted with other employees of employer; however, she stated that she and her husband do not have a social relationship with other employees. She stated that appellant's phone number was unlisted, and not generally given out, even to family members. She denied ever talking to Ms. B about appellant's injury. She stated that appellant called her after the accident and told her about the occurrence as stated above.

Appellant presented two other witnesses by deposition. ("Mr. V"), a supervisor for Cafeteria F, testified that he saw appellant limping on (date of injury) and asked him what happened, and that appellant stated he tripped in a drain screen located through the hallway between the dish room and the hot line area. He testified that he saw appellant's ankle and it looked swollen. He did not recall whether appellant indicated when this happened. Mr. V stated that he considered appellant one of the kitchen employees, who he asked to bring what he needed from the kitchen.

("Mr. J") stated that he was a production manager stationed in the main kitchen, and that appellant answered either directly to him or to another lower-tier supervisor. He stated that he did not know about the accident in question until the day appellant was supposed to go to the doctor, and came in around noon to ask to leave at two o'clock for a doctor's appointment. Mr. J testified that he did not have this conversation with appellant on June 3; however, other than that, the date was not specified by this witness. He stated that appellant told him, in response to his query as to what happened, that "Well, I slipped down at the cafeteria."

Respondent presented three witnesses, Ms. B, ("Ms. L") , a cashier supervisor for employer, and ("Mr. R"), a food service director for employer. Ms. B handles personnel records and accident reports. Because she did not have claimant's home phone number, she asked his sister, also an employee of the employer, to ask him to call regarding overpayment of wages and the incident. Ms. B stated that on June 6, appellant's wife called. She stated that she recognized her voice due to prior contacts. She stated that when she brought up the need for appellant to make an accident report, his wife stated that there was no on-the-job accident. Later that morning, at approximately 10:00 a.m., appellant came into the office and spoke to Ms. B; they discussed the matter of the overpayment, and then Ms. B said that she had thought he hurt himself of the job, and appellant said no, that he had hurt himself at the lake. A written statement completed by Ms. B on June 6th indicates that appellant's wife told her he was not hurt on the job, and

further told her that his doctor said that working on his feet worsened the injury to his ankle. The note further records that appellant admitted to her and another person in the office that he was not hurt on the job but at the lake. Ms. B testified that she had no bad or hostile feelings toward appellant or his wife, and did not care one way or the other about the outcome of his claim, although appellant inferred, through cross-examination that she had two more years of work until retirement and might wish to avoid early retirement. Ms. B's testimony, however, denied this inference.

Ms. L testified that on June 6th, appellant told her, in a Spanish conversation, that he had injured himself at home, when she asked him what happened. She stated that he was in the office with Ms. B when she saw him, wearing regular, rather than work, clothing. There was no further inquiry or explanation in their conversation regarding the occurence of the injury.

Mr. R, the Food Service Director, testified extensively as to the physical layout of the area around the elevator. He testified that he was very familiar with the physical layout of the facilities, and had in fact helped design some of them. He submitted a diagram of the area that he drew. He stated that it is ten feet from the elevator door to the kitchen doors. The drain is not located straight behind the elevator doors, but angles off at the "8 o'clock" position and is about 12 feet, five inches from the elevator doors. The floor is straight but slopes down slightly in the immediate area of the drain grate, which is flush with the floor and screwed into the floor, not loose. The elevator has a single door that closes slowly from one side to the other, and is equipped with a bumper guard, or sensor, so that it will automatically retract upon contact with an object in its path. Mr. R further indicated that the door is about eight and a half feet tall, but relatively narrow so that carts would have to be loaded into it straight on, rather than at an angle.

Regarding his knowledge of the alleged injury, Mr. R stated that he came out of his office at the end of the day on (date of injury), and saw appellant in the vicinity, and noticed him limping. When he asked what was wrong with apellant's foot, appellant stated that he injured his foot on the job. When Mr. R asked him what happened, he testified that appellant was clear about what happened, but did not go into great detail about the incident. Mr. R stated that elevators were not mentioned, but testified on direct testimony that appellant indicated he slipped in a drain as he took food to Cafeteria F. Mr. R inquired as to whether it had been reported, heard that it had been reported to Mr. V and Mr. J, and then told appellant not to hesitate to ask if he needed time to go see the doctor. He stated that appellant said that it was fine, or that it was no big deal and was not bothering him.

On June 11, appellant met subsequently with Mr. R and the regional director for Employer. Mr. R testified that they wanted to inquire further because they became aware of statements made to other workers indicating that the injury did not occur on-the-job. He stated that when asked about the injury at this meeting, appellant admitted that he had been injured at the lake and said he felt that he had been rushed in his conversation with Mr. R. Appellant questioned why it was necessary for him to explain everything. Appellant was

terminated from employment at the conclusion of this meeting. Appellant testified on rebuttal that the meeting took place but denied that he had stated he was hurt anywhere but on the job. On rebuttal, he did not offer testimony to refute Mr. R's indication that the accident could not physically have happened in the location of the elevators as described by him in his direct testimony.

Both appellant and respondent objected, at different times, to a detailed exploration of medical issues as beyond the scope of the benefit review conference; the respondent contended they had not been exchanged, although appellant's counsel was adament that they had been exchanged at or after the benefit review conference, prior to her involvement in the case. The hearing officer called a recess to allow the parties to examine each other's documents. The hearing officer ultimately admitted medical evidence tendered by appellant, after earlier indicating that he would consider it relevant for the purpose only of shedding light as to whether an injury occurred in the course and scope of employment. There were no records included from the doctor whom appellant states he first consulted for the injury on (date of injury). A memorandum indicates that X-rays taken June 28, 1991, indicate no evidence of a fracture and no abnormal calcifications in the soft tissues. Physical therapy billing records and a stamped "certificate to return to work" form indicate that appellant had a sprained right leg, thigh, leg, and foot. Because the issues were limited to those considered at the BRC, there was no exploration of whether disability, as defined in the 1989 Act, resulted from the condition described in these records. None of the medical records in evidence indicate any opinion or statement as to the cause of the injury.

Appellant argues that evidence presented against him consists of hearsay statements allegedly made by him, denied under oath by the appellant, and are therefore insufficient to support the hearing officer's decision. No authority is offered for this point. We'd first note that, under the 1989 Act, strict adherence to the rules of evidence is not required in contested case hearings. Art. 8308- 6.34 (e). Further, the statements in question that were reportedly made by the appellant himself are admissible as admissions against interest. Snyder v. Schill, 388 S.W.2d 208 (Tex. Civ. App.- Houston 1964, writ ref'd n.r.e.); Texas Employers' Insurance Ass'n v. Smith, 592 S.W.2d 10 (Tex. Civ. App.- Texarkana 1979, no writ).

We would also note that, leaving aside for a moment such admissions, the hearing officer could have formed the opinion that appellant's accountings to co-workers of how the accident occurred on the job were inconsistent and failed to sustain his burden: Mr. V was told on (date of injury) that appellant slipped through a drain screen between the dish room and hot line area; later that day, Mr. J was told that appellant slipped down at the cafeteria. Finally, at the end of the work day on (date of injury), Mr. R was told that appellant slipped as he took food to F Cafeteria, but did not mention the elevators at that time.

As stated before, the hearing officer is the sole judge of the credibility, relevance, materiality, and the weight accorded to the evidence. There is probative evidence in the record sufficient to sustain the findings and conclusions of the hearing officer. His decision is affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge